CASE NO. 79-1881

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DARRELL M. AGRELLA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE DEFENDANT, DARRELL AGRELLA, HAS PROPERLY PRESERVED ANY SUBSTANTIAL FEDERAL QUESTION WARRANTING THE EXERCISE OF THIS COURT'S DISCRETIONARY JURISDICTION.

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PREFACE

The Petitioner, Darrell Agrella, was the defendant in the Florida trial court below. The State of Florida was the prosecution below. In this brief, the parties will be refered to as they appeared in the trial court below.

The following references are made in this brief:

(A) For the Appendix to the brief of the Petitioner consisting of pages A1-A18.

I.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, affirming the conviction of the Defendant, Darrell Agrella, is reported at Agrella v. State, 372 So.2d 487 (Fla. 3d DCA 1979). See, also, A3-A5. The opinion of the Suprme Court of Florida, denying certiorari is reported at Agrella v. State, 383 So.2d 1189 (Fla. 1980). See, also, A1-A2. There are no official reports for citation of these decisions.

II.

JURISDICTION

The Defendant, Darrell Agrella, claims jurisdiction herein based upon 28 U.S.C. 1257(3).

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III.

STATEMENT OF THE CASE

The Defendant, Darrell Agrella was charged by information in the Florida trial court below with second degree murder, robbery and burglary. 372 So.2d 488 (See, A3-A4). The Defendant's co defendant was

Ronny A. Zamora, whose trial and conviction are reported at, Zamora v. State, 361 So. 2d 776 (Fla. 3d DCA 1978). Id. There was no trial or even an attempt at voir dire in the case at bar. Id.

Relative to the Petition for Certiorari herein, the Defendant, Agrella, sought an absolute discharge from criminal responsibility in the Florida trial courts, based upon a summary argument that he could not receive a fair trial because of the televised trial of the Codefendant, Ronny A. Zamora. Id. The precise issue presented for review in the Florida Courts was succinctly noted by the Florida District Court, thus:

> "The issues raised are (1) whether the trial court erred in denying the defendant's motion for discharge because of pretrial publicity and (2) whether the defendant's right to a speedy trial was violated even though he waived a speedy trial in order to minimize pretrial publicity."
>
> Id.

In rejecting the Defendant's complaint of error arising from bare allegations of prejudicial pretrial publicity, the Florida District Court succinctly explained that:

> "Agrella filed his motion for discharge on October 7, 1977. He alleged that the pretrial publicity in his case resulting from Zamora's televised trial, with the broadcast and rebroadcast of that trial, created conditions under which he (Agrella) could not receive a fair trial. He relies on this argument alone. He presumes that it was the duty of the trial court to take judicial notice of the prejudice he claims was created in the community, state and nation against him by the widespread broadcast of the Zamora trial. There was no attempt at jury selection; there was no trial. Other than our presumed duty to believe that there was prejudice, there is no evidence in the record for this court to consider.
>
> "A claimed constitutional right to a television-free trial has already been rejected by this court. See Chandler v. State, 366 So.2d 64 (Fla. 3d DCA 1978). An appellant who alleges error in the trial court must show such error in the record. See Marks v. Insurance Service Bureau, Inc., 262 So.2d 450 (Fla. 3d DCA 1972); see also Bryant

> v. State, 204 So.2d 9 (Fla. 3d DCA 1967). It follows that a point claiming that an accused should have been discharged because of pretrial publicity in another case carries with it the burden of presenting facts to the trial court raising the issue. There being no facts in this record, we cannot find error. Cf. Abbott v. State, 334 So.2d 642 (Fla. 3d DCA 1976); and Murphy v. State, 252 So.2d 385 (Fla. 3d DCA 1971).
>
> Affirmed." [Emphasis added].
>
> 372 So.2d at 488.

The State would also note that the Defendant also made no effort whatsoever to seek a change of venue.

On February 28, 1980, the Florida Supreme Court refused to entertain the Defendant's Petition for Certiorari upon the grounds that it was without jurisdiction under Rule 9.120 Florida Rules of Appellate Procedure. See, A1-A2 (383 So.2d 1189). On May 28, 1980, the Defendant filed his Petition for Certiorari to the Supreme Court of Florida.

IV

ARGUMENT

The issue of the constitutionality of Florida Judicial Canon 3A(7) permitting cameras and other electronic media in Florida Courtrooms as reported at, Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979), was never properly presented or preserved in the Florida Courts. See, A1-A5. It is well settled that complaints of error grounded upon prejudicial pretrial publicity and allegations of the lack of an impartial jury, must be grounded upon factual findings in the record. See, Murphy v. Florida, 421 U.S. 794 (1975); United States v. Haldeman, 559 F.2d 31, 59-71 (D.C. Cir. 1976), cert.den. 431 U.S. 933 (1977). Bare allegations of error concerning the knowledge of the veniremen of the pretrial publicity surrounding a case, are insufficient to warrant reversal.

Murphy v. Florida, 421 U.S. at 800-801; United States v. Haldeman, supra, at 60; Murphy v. State, 252 So.2d 385, at 387 (Fla. 3d DCA 1971). The burden is upon the appellant to show actual prejudice. Murphy v. Florida; Murphy v. State. Absent findings of fact and at least a record of voir dire, there is nothing which could be presented before this Court to warrant the exercise of jurisdiction. Certainly, the Petitioner has no standing to assert the rights of the codefendant, Ronny Zamora, as he attempts to do here. County Court of Ulster County, New York v. Allen, ___U.S. ___, 99 S.Ct. 2213, at 2223 (1979).

In the decisions relied upon by the Petitioner for conflict herein, the appellate court was presented with a record showing at least voir dire and a full jury trial. See, Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); see also, Irvin v. Dowd, 366 U.S.

717 (1961). Thus, in Sheppard v. Maxwell, the Court emphasized the trial court's failure to take measures to insulate the jury from massive publicity during the trial and the lack of that, "judicial serenity and calm to which [Sheppard] was entitled." 384 U.S., supra, at 355; see, also, Murphy v. Florida. In Irvin v. Dowd, the court did not simply review the pre-trial publicity and conclude that prejudice resulted. Rather, the court,"independently evaluate[d] the voir dire testimony of the impaneled jurors," [emphasis added]. See, 366 U.S. at 723. Even in Estes v. Texas, the court had the factual setting of the defendant's trial to weigh, in determining that the defendant had been deprived of due process by the televising and broadcast of his trial. 381 U.S. at 535.

The Defendant by his Motion for Discharge upon which his petition is predicated, sought to have the substance

of the charges against him entirely dismissed, rather than seeking a change of venue. The Defendant argues that no where in Florida, and even nowhere on this country, could the Defendant have received a fair trial because of pretrial pubicity. Even the most extreme of the pretrial publicity cases do not contemplate such an absurd result. See, Rideau v. Louisiana, 373 U.S. 723, (1963); Sheppard v. Maxwell; Irvin v. Dowd, supra. Even in the most extreme circumstance of pretrial publicity, the proper remedy is only a change of venue, and not outright dismissal. See, Rideau v. Louisiana.

Sub judice, the Defendant's assertion of jurisdiction is based upon bare speculation. In Haldeman, in observing the policy in Irvin v. Dowd, the Court also stated the controlling principle herein, to wit:

> "Irvin establishes 'a common-sense standard' of juror qualification. United States v. Caldwell, 178

> U.S. App. D.C. 20,33, 543 F.2d 1333, 1346 (1974), cert denied, 423 U.S. 1087, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976). In keeping with that approach, a defendant who claims he was denied a fair trial because the jury was not sufficiently 'indifferent' generally must sustain that claim "not as a matter of speculation but as a demonstrable reality." United States ex rel. Darcy v. Handy, 351 U.S. 454, 462, 76 S.Ct. 965, 970, 100 L.Ed. 1331 (1956), quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 281, 63 S.Ct. 236, 87 L.Ed. 268 (1942). This demonstration can be made only by reference to the voir dire." [emphasis added, footnote omitted].
>
> 559 F.2d, supra, at 60.

It is wholly apparent, upon the face of the record, that the conviction herein rests upon non-federal grounds; that the Defendant has failed to properly preserve the federal question of which he complains and that the question of the failure of the Defendant to render an adequate record is manifestly not a substantial federal question. The cause herein should therefore, be dismissed,

certiorari denied and/or the judgment below should be affirmed, inasmuch as the question presented by the Defendant is "so unsubstantial as to not need further argument." Durley v. Mayo, 351 U.S. 2, (1956); Rice v. Sioux City Cemetery, 349 U.S. 70 (1955); Lynch v. New York, 293 U.S. 52 (1934).

V.

CONCLUSION

WHEREFORE, upon the foregoing, the Respondent, THE STATE OF FLORIDA, prays that this Honorable Court will enter its order deny certiorari affirming the judgment below and/or dismissing the Defendant's petition.

RESPECTFULLY SUBMITTED, on this ___ day of August, 1980, at Miami, Dade County, Florida.

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